United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7217

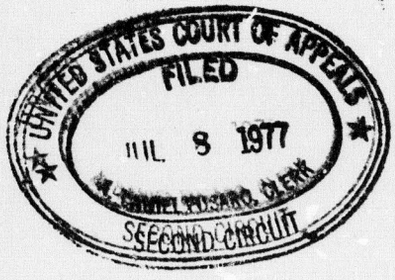
To be argued by
JAMES M. BERGEN

B P/S 1/L

In The

United States Court of Appeals

For The Second Circuit



MAGNALEASING, INC.,
Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,
Defendants-Appellants.

ORIGINAL

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
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MAGNALEASING, INC.,

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-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,

Defendants-Appellants.

----------x

BRIEF FOR APPELLANTS STATEN ISLAND MALL, BLACKFRIARS REALTY CORPORATION, AND TOTTENHAM REALTY CORPORATION

PRELIMINARY STATEMENT

Defendants Staten Island Mall ("Mall"), Blackfriars Realty Corporation ("Blackfriars"), and Tottenham Realty Corporation ("Tottenham") appeal from the final judgment (A. 150a),* entered March 31, 1977, in the United States District

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* References to Volumes I and II of the Appendix (containing miscellaneous Court papers and the trial transcript, respectively) will be preceded by the letter "A"; references to Volume I will be succeeded by the letter "a". References to Volume III of the Appendix (containing the transcript of the damages reference before the Special Master) will be preceded by the letter "D". References to plaintiff's exhibits will be preceded by "PX" and to defendants' exhibits by "DX". Unless otherwise specified, all such references are to exhibits offered at the trial before the Court. Page references to materials contained in the Exhibit Volume will be preceded by the letter "E".

Court for the Southern District of New York. The judgment, entered after a non-jury trial before Judge Lloyd F. MacMahon and a reference before Magistrate Martin D. Jacobs:

1) awarded plaintiff Magnaleasing, Inc. ("Magnaleasing") damages in the amount of $156,769.99, and

2) rescinded a fifteen-year lease of commercial property, executed between plaintiff as tenant and defendants as landlord.

The judgment followed two decisions, discussed below, rendered by Judge MacMahon and reported at 428 F.Supp. 1039.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in failing to articulate and apply the higher burden of proof necessary to sustain a claim for fraud?

2. In light of the allegations made and the proof adduced, did the District Court err in refusing to dismiss the amended complaint as a matter of law?

3. Was the District Court's finding that defendants had defrauded plaintiff clearly erroneous?

4. Did the District Court err in excluding evidence that would have tended to negate a finding of fraud on defendants' part?

5. In light of plaintiff's inaction long after learning of the wrongs complained of, did the District Court err in granting rescission?

6. Did the District Court improperly re-open the record so as to permit plaintiff to supply missing and essential proof of damages?

STATEMENT OF THE CASE

The nature of the case

This is an action for damages and rescission of a lease, plaintiff claiming that it had been fraudulently induced to enter into the lease by misrepresentations attributed to defendants. The case was tried and decided on the theory of common-law fraud.*

The parties

Plaintiff Magnaleasing, a Delaware corporation, is a wholly-owned subsidiary of The Magnavox Company ("Magnavox") (Joint Statement of Stipulated and Disputed Facts ["Joint Statement"] ¶1 at E 1). Magnaleasing was incorporated to engage in the business of leasing properties for use by Magnavox and its retail distributors (Joint Statement ¶25 at E 5).

---

* Plaintiff's amended complaint (A. 6a) originally contained six causes of action. At trial, plaintiff abandoned four of its claims: the second (A. 10, 376) and fifth (A. 16, 378) causes of action, which had alleged fraudulent omissions on defendants' part; the third (A. 377) and sixth causes of action (A. 378), which had alleged mutual mistake. As shown below, plaintiff abandoned also several of the specific misrepresentations alleged under its two surviving claims: the first and fifth causes of action.

Defendant Mall is a joint venture consisting of two New York corporations, defendants Blackfriars and Tottenham (Joint Statement ¶7 at E 2). Mall is the owner of the Staten Island Mall, the focal point of a 120-acre shopping center complex ("Shopping Center") situated in Richmond County, New York (Joint Statement ¶10 at E 2).

The course of the proceedings and the disposition of the case below

Plaintiff commenced this action on December 19, 1974. On January 13, 1976, plaintiff filed the amended complaint (A. 6a) that underlies the judgment herein.

Judge MacMahon tried this case without a jury on March 22, 23 and 24, 1976. By decision filed July 6, 1976 (A. 35a), the District Court concluded that defendants had defrauded plaintiff, rescinded the lease between plaintiff and defendants, and directed that a reference be held on the damages issue before Magistrate Jacobs, sitting as Special Master. By interlocutory judgment filed July 20, 1976 (A. 50a), the lease was rescinded and defendants' counterclaim for attorneys' fees was dismissed without prejudice.

The damages reference was conducted before Magistrate Jacobs on August 31 and November 4, 1976. By report filed February 14, 1977 (A. 52a), Magistrate Jacobs recommended a damages award against defendants in the amount of $156,769.99, with interest from September 1, 1976. By decision filed March 22, 1977 (A. 142a), the District Court confirmed the Magistrate's report. On March 31, 1977, final judgment was entered (A. 150a), awarding plaintiff the damages previously determined.

Defendants filed their notice of appeal (A. 153a) on April 28, 1977.

STATEMENT OF THE FACTS

On April 26, 1973, Magnaleasing, as tenant, executed a 79-page lease ("Lease") for the rental of commercial property at the Shopping Center (Joint Statement ¶11 at E 3). Mall, as lessor, executed the Lease on May 4, 1973. (Id.) The strength or weakness of plaintiff's case turns on the contextual significance of three representations, two of which were oral and said to have been made by defendants' agent on December 4, 1972, during pre-Lease negotiations.

The background of the controversy

In 1972, defendant Mall was in the process of constructing the Shopping Center, a 120-acre complex highlighted by an enclosed regional mall that ultimately opened for business on August 9, 1973 (Joint Statement ¶¶ 10, 16 at E 2, 4). In 1972 also, Magnavox was casting about for locations for so-called Home Entertainment Centers, through which Magnavox marketed its products (Joint Statement ¶¶ 25, 31 at E 5, 6).

By letter dated November 2, 1972, plaintiff's John Kelly ("Kelly") wrote defendants, expressing preliminary interest in the prospect of leasing space at the yet-to-be-constructed Shopping Center (Joint Statement ¶31 at E 6). By letter dated November 16, 1972, George Kirtland ("Kirtland") responded to Kelly's inquiry, enclosing advertising brochures, leasing plans and demographic data

(Joint Statement ¶32 at E 7; PX 19 at E 22). The two advertising brochures contained the written representation claimed by plaintiff to be fraudulent.

It was Kelly who was to negotiate the terms of the Lease on plaintiff's behalf (Joint Statement ¶20 at E 4). At the time of such negotiations, Kelly was Magnavox's Corporate Director of Real Estate (Joint Statement ¶22 at E 4-5). As such, Kelly was responsible for the acquisition, disposal and administration of all Magnavox real estate and was responsible in particular for negotiating all leases on behalf of Magnavox (Joint Statement ¶24 at E 5). He had previously served in a comparable capacity for Food Fair, Inc. (Joint Statement ¶23 at E 5); Kelly was and is an attorney, having graduated from the University of Maryland Law School (Joint Statement ¶21 at E 4); since January 1, 1975, he has been Group Counsel for Magnavox's Home Furnishings and Music Group (Joint Statement ¶22 at E 4).

Kelly was later to become vice president of Magnaleasing and executed the Lease as such (PX 15 at E 183). Magnaleasing was not incorporated until February 20, 1973 (Joint Statement ¶2 at E 1), i.e., after the making of the representations at issue herein.

Kirtland was and is a licensed real estate salesman and an employee of Feist & Feist ("Feist") (Joint Statement ¶26 at E 5). Feist, a New Jersey corporation, was Mall's managing and leasing agent for the Shopping Center (Joint Statement ¶¶ 8-9 at E 2). Kirtland negotiated the "business" terms of

the Lease with Kelly (Joint Statement ¶28 at E 6) and made the (verbal) representations to Kelly that are the subject of this lawsuit (Joint Statement ¶29 at E 6).

Those representations are said to have been made on December 4, 1972, during the one face-to-face meeting the parties had, a 30-60 minute session in a trailer on the Shopping Center construction site (Joint Statement ¶¶ 29, 35 at E 6, E 7-8). At that time, the parties could look out upon what was little more than a "hole in the ground"; some concrete had been poured, a few exterior walls had been erected (A. 39-40). Except for Macy's, one of the "anchor" stores - Sears, Roebuck was to become the other - not a single tenant had opened for business (A. 39). In short, the Shopping Center was yet to be.

The December 4, 1972 meeting and the three misrepresentations claimed actionable

As indicated above, Kelly negotiated for Magnavox. Also present at the meeting on Magnavox's behalf were Dale Kelly,* a marketing manager, and Darryl Laxson, another marketing official (Joint Statement ¶29 at E 6). Kirtland alone was present on behalf of Feist.

Kirtland and Kelly discussed the size and type of operation Magnavox was interested in operating, the demographics of the Staten Island area and, eventu-

* For the sake of clarity, all subsequent references to "Kelly" are to John Kelly.

ally, the "economics of the deal" (A. 166-67, 171). As to such "economics", Kirtland said that Mall was looking for basic rent in the amount of $10 per square foot per year (A. 171).*

It was respecting additional rent charges that Kirtland is said to have made two misrepresentations. Kelly testified that Kirtland told him that Magnavox would pay its pro rata share of real estate taxes ("Tax Rent") on the entire Shopping Center, estimated to be $1.25 per square foot per year (A. 171). More particularly, Kelly said that Kirtland told him that the Mall would pay the first 25¢ per square foot per year and that "anything in addition" to that sum Magnavox would pay (A. 190-91). Kelly conceded that he understood the $1.00 net figure given by Kirtland to have been an "estimate" (A. 190).

As reflected in the amended complaint, this representation is said to have been

> that the Tax Rent would be approximately One ($1.00) Dollar per square foot per annum when the Mall was fully operational and thereafter subject to normal Tax increases. (A. 8a)

The amended complaint further recites that this representation was false in that

> in truth the Tax Rent was more than four times as much as defendants represented when the Mall opened and is now more than six times as much as defendants represented. (A. 10a)

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* As shown below, Magnaleasing ultimately negotiated a far more favorable price, with initial basic rent set at $6.50 per square foot per year.

The second misrepresentation is said to have concerned defendants' estimate of common area charges ("Common Area Charges"). Kelly testified originally that Kirtland told him that Magnavox would pay its pro rata share of all such charges for the entire Shopping Center, estimated to be $.60 per square foot per year (A. 171). As discussed below, Kelly later testified (A. 227) that what Kirtland told him concerning Common Area Charges comported exactly with what ultimately appeared in Section 5.3B of Magnaleasing's Lease.

As reflected in the amended complaint, this representation is said to have been

> that the Common Area Charges would be approximately Sixty ($.60) Cents per square foot per annum for the initial year of operation and thereafter subject to normal increases due to inflation. (A. 8a)

This representation is said to have been false in that

> in truth the Common Area Charge was more than four times higher than defendants had represented. (A. 10a)

The third representation claimed actionable by Magnaleasing appeared in the promotional brochures earlier sent Kelly by Kirtland. According to the amended complaint, defendants had stated that "at the time plaintiff was negotiating its lease [,] the Mall was already more than 50% leased [.]" (A. 8a) Plaintiff further claims that in truth, the Shopping Center was only about 32% leased as of December 4, 1972 (PX 7 at E 55).*

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* Plaintiff's amended complaint had set forth four additional representations said to have been fraudulent. Claims as to these four were abandoned at trial (A. 11, 321, 335-36).

Events following the parties' December 4, 1972 meeting

After the December 4, 1972, meeting, the parties did not again discuss the subject matter of the three representations sued upon herein (A. 198). Negotiations proceeded as to the business terms of the proposed Lease. By letter dated January 15, 1973 (PX 23 at E 239), Kirtland sent Kelly an outline of the business terms tentatively agreed upon. By letter dated January 29, 1973 (DX J at E 275), Kirtland sent Kelly a draft Lease and invited his comments. Thereafter, negotiations were conducted between counsel -- Kelly for Magnaleasing, Robert Ungerleider for defendants (Joint Statement ¶¶20, 27-8 at E 4, 5-6). By letter dated February 27, 1973, Kelly sent defendants a 15-page, single-spaced document entitled "Lease Comments" and proposing 115 modifications in the draft Lease earlier sent Magnaleasing (PX L at E 278, 279; Joint Statement ¶48 at E 13).* Kelly also sent a copy of the draft Lease to Thomas N. Hafner, the "in house" Magnavox attorney responsible for legal review of the Lease (Joint Statement ¶¶50, 51 at E 13; DX FF at E 328). Hafner did not read the Lease prior to its execution (Joint Statement ¶51 at E 13).

The Lease

Kelly executed the Lease on Magnaleasing's behalf on April 26, 1973; on that same day, Magnavox signed the Lease as guarantor of Magnaleasing's obligations thereunder (Joint Statement ¶11-12 at E 3). Mall executed the Lease on May 4, 1973 (Joint Statement ¶11 at E 3).

* At trial, Judge MacMahon refused to receive into evidence Magnaleasing's Lease Comments (A. 202). He refused notwithstanding the sophistication the document evidences on plaintiff's part and the relevance of that sophistication to the issue of justifiable reliance, an essential element of a fraud claim. See infra at 33.

The Lease (PX 15 at E 93) consists of 79 printed and typewritten pages. Of the 42 pages that constitute the principal text -- apart, that is, from the signature and acknowledgment pages, the guaranty, the "rider", and various exhibits -- fully 37 pages are filled with 90 separate interlineations and "cross-outs," reflecting a like number of modifications successfully negotiated by Magnaleasing. Each such page was initialed by Magnaleasing's Kelly.

The Lease provides that Magnaleasing is to lease Store No. 201 in the Shopping Center, consisting of approximately 3,626 square feet of space, for a basic term of 15 years (PX 15 at E 101, Section 1.1; Joint Statement ¶13 at E 3). The premises are to be used as a Magnavox Home Entertainment Center, i.e., for the retail sale of Magnavox televisions, stereo components and other such products (PX 15 at E 101-102, Section 1.1). The Lease fixes Magnaleasing's initial basic rent at $6.50 per square foot per annum, or approximately $23,452.00 per year.

As to the subject matter of the representation concerning the leasing level attained at the Shopping Center, the Lease is silent.

As to the subject matter of the principal two representations, both Tax Rent and Common Area Charges are defined as Additional Rent under the Lease (PX 15 at E 112-13, Section 4.1B). The Lease calls upon Magnaleasing to pay its share of all "Taxes" levied on the Shopping Center; these taxes include all real estate and other such taxes "of every kind and nature whatsoever, extraordinary as well as ordinary, foreseen and unforseen... ." (PX 15 at E 118, Section 4.5A) Similarly, the Lease provides that Magnaleasing is to pay its portion of Common Area Charges, defined (PX 15 at E 125, Section 5.3A(i)) as embracing the

cost of operating, equipping, cleaning, lighting and maintaining security within the Common Area, together with administrative overhead.

The formulae for calculating Magnaleasing's Tax Rent and Common Area Charges are set forth in Lease sections 4.5B and 5.3A(ii), respectively. To the extent relevant, both formulae are identical and provide that Magnaleasing shall pay essentially as follows:

Tenant's annual share of Additional Rent =

$$\text{Annual total of all such expenses (Taxes or Common Area Charges, as the case may be)} \times \frac{\text{Floor space of Tenant's demised premises}}{\text{Floor space of all leased or occupied space in Shopping Center*}}$$

There is nothing in the Lease that puts a $1.00 per square foot per year ceiling on Magnaleasing's Tax Rent -- or any other such ceiling. Neither does the Lease estimate what Magnaleasing's Tax Rent will be.

There is nothing in the Lease that puts a $.60 per square foot ceiling on Magnaleasing's Common Area Charges -- or any other such ceiling. Neither does the Lease estimate what Magnaleasing's Common Area Charges will be.

The Lease provides that "[a]ll negotiations, considerations, representations and understandings between the parties are incorporated in this Lease" (PX

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* Respecting Tax Rent, this formula is modified to the extent that the amount calculated is reduced by the landlord's contribution: 25¢ per square foot of Magnaleasing's floor space per year. (PX 15 at 119-20, Section 4.5B).

15 at E 175, Section 11.6), that its terms may not be changed orally (PX 15 at E 183, Section 11.14), and that:

> Landlord or Landlord's Agents have made no representations, warranties or promises with respect to the Demised Premises or the Building except as herein expressly set forth. (PX 15 at 183, Section 11.15)

Note: Some Mall tenants negotiated lease clauses providing for payment of Additional Rent on a "leasable" rather than a "leased" basis. That is, they paid Tax Rent and Common Area Charges in proportion to the (unvarying) amount of leasable space at the Shopping Center, rather than to the amount of space leased at any given time. Where, as here, the Shopping Center was less than fully leased, it is readily apparent that such "leasable" tenants paid considerably less Additional Rent than their "leased" counterparts, including Magnaleasing. The trial court excluded evidence proffered as to the economic impact of the differential between the two clauses and of the legal significance of that differential for Magnaleasing's claims. As discussed below, defendants contend that such exclusion was erroneous.

The parties' dispute

Defendants' predictions as to future Tax Rent and Common Area Charges proved low. Magnaleasing's Tax Rent for the initial period, August 9, 1973, to January 31, 1974, was $2.45 per square foot per year (Joint Statement ¶64 at E 16). During the following two Lease Years, Magnaleasing's Tax Rent went to

$4.35 and $6.04 (D-174; Joint Statement ¶66 at E 17). Those Shopping Center tenants who paid on a "leasable" space formula rather than "leased" paid less additional rent. Indeed, such tenants' initial Tax Rent was $1.36 per square foot per year, i.e., not far above the $1.00 prediction said to have been relied upon by Magnaleasing (D-174). In the next two lease years, such tenants' Tax Rent was $3.15 and $4.87 (D-174-75).

Common Area Charges at the Shopping Center proved, ultimately, to be $2.58 per square foot for Magnaleasing and other such "leased" space tenants, $1.97 for "leasable" tenants (D-174; Joint Statement ¶63 at E 16).

As for the third representation, the trial court found (A. 38a) that as of December 4, 1972, the Shopping Center was only 32% leased, contrary to the 50% figure earlier used in the promotional brochures (PX 1 and 2 at E 46 and 48).

In each instance, the asserted discrepancy between the numbers -- between the projections of future Tax Rent and Common Area Charges and the ultimate costs, between the statements as to leasing and the summary data -- underlies plaintiff's claims herein.

The trial court's theory of the case

John Feist, Feist's vice president, testified that in 1972, he believed Tax Rent and Common Area Charges at the then unbuilt Shopping Center would be approximately $1.00 and $.60, respectively, per square foot per year (A. 44-45). He said that he based such projections on his previous experience in the shop-

ping center field generally and, respecting Tax Rent in particular, on real estate taxes levied on an adjacent Korvettes shopping center (A. 101-103). He stated also that he conveyed such beliefs to his leasing agents, including Kirtland, and that he knew the agents would give such projections to prospective tenants who inquired about such matters (A. 73).

Plaintiff introduced documents showing that Feist's' former construction manager and controller (Ed Fraher and Don Faughnan) had also prepared projections -- of Tax Rent and Common Area Charges, respectively. These projections were higher than John Feist's; they ranged from $1.19 to more than $2.00 for Tax Rent and from $1.76 to $2.26 for Common Area Charges (PX 9 and 10 at E 62 and 68).

John Feist, a man of acknowledged expertise in the leasing of shopping centers (Joint Statement ¶101 at E 23), testified that he did not believe these higher projections, which were grossly out of line with the then-prevailing averages at other regional shopping malls in the northeastern United States (A. 101, 108; PX 9 at E 62). Plaintiff introduced no evidence that disproved John Feist's statement in this respect and, for that matter, no evidence on the competence vel non of the Feist employees who produced the higher estimates. Nonetheless, Judge MacMahon predicated his decision that defendants had defrauded plaintiff principally upon his finding that John Feist did not in fact believe his own projections (A. 44a). As shown below at 24, 38 and 43-5, such finding is neither legally relevant nor factually warranted.

As to the representation concerning leasing, plaintiff introduced evidence

(PX 7 at E 55) showing that leases had been executed on 32% of the Shopping Center space as of December 4, 1972. The trial court, as discussed more fully below, ignored defendants' evidence that by any meaningful standard, leasing had "surpassed the 50 percent mark". (PX 3 at E 48). In addition and respecting Judge MacMahon's narrow reading of the word "leasing," the trial court found plaintiff to have justifiably relied on defendants' 50% representation. It drew such conclusion notwithstanding uncontradicted proof, analyzed below, that on December 4, 1972, plaintiff's representatives were shown charts indicating that less than 30% of the Shopping Center had been leased.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FAILING TO ARTICULATE AND APPLY THE HIGHER BURDEN OF PROOF NEEDED TO SUSTAIN A FINDING OF FRAUD

As shown above, this was a fraud case, tried as such, decided as such. Under New York law, fraud must be proved by "clear and convincing" evidence. Rudman v. Cowles Communications, Inc., 30 N.Y.2d 1, 10, 330 N.Y.S.2d 33, 39 (1972); Cave v. Green, 281 App.Div. 560, 120 N.Y.S.2d 865, 867 (1st Dept.), appeal dismissed, 306 N.Y. 669, 116 N.E.2d 499 (1953), aff'd, 308 N.Y. 754, 125 N.E.2d 109 (1955). Each element of the plaintiff's case must be so substantiated, Freedman v. Norddeutscher Lloyd, 22 Misc.2d 397, 199 N.Y.S.2d 709, 711 (Sup. Ct. N.Y. Co. 1959), aff'd, 12 A.D.2d 591, 209 N.Y.S.2d 766 (1st Dept. 1960), and the standard of proof required to sustain a finding of fraud is far more demanding than, for example, that needed to prove a breach of contract. Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 302 N.Y.S.2d 799, 805

(1969). Yet in his opinion, Judge MacMahon failed to articulate and, more importantly, to apply the higher burden of proof that must sustain a proper finding of fraud. That failure is itself grounds for reversal. Two Second Circuit decisions hold as much. McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170 (2d Cir. 1972); Barr Rubber Products Company v. Sun Rubber Company, 425 F.2d 1114 (2d Cir.), cert. denied, 400 U.S. 878 (1970).

In Barr Rubber, the plaintiff had prevailed on a theory of civil perjury in an action before the trial court sitting without a jury. This Court analogized to the standard of review applicable in fraud cases and declared itself "troubled" by the lower court's failure to define the applicable quantum of proof in the suit before it. 425 F.2d 1114, 1120-21. In the face of the trial judge's silence on such a critical point, this Court presumed that he had improperly applied the lesser "preponderance of the evidence" test -- and reversed. Id. at 1120-21, 1128.

The Barr Rubber holding was reaffirmed in McDonnell v. American Leduc Petroleums, Ltd., 456 F.2d 1170 (2d Cir. 1972). After a non-jury trial, defendant had been found liable for fraud. This Court noted that the trial court had not "ma[d]e clear the standard of proof it used," a failing it found "especially troublesome" in light of the applicable law's requirement that fraud must be proved by "clear and convincing" evidence. Id. at 1176. Invoking Barr Rubber, the Court stated:

> The gravity of a finding such as fraud or perjury requires at least some indication that the trier of fact has found that the complaining party has met the more rigorous standard of proof. Id.

Accordingly, the Court remanded the case.

In the action at bar, Judge MacMahon committed the same error that led this Court to reverse and remand in Barr Rubber and McDonnell. His July 6, 1976 opinion nowhere indicates the standard of proof utilized to judge plaintiff's fraud case, and in light of this Court's teachings, it must be presumed that he impermissibly used the "preponderance of the evidence" test. As shown below, defendants contend that a finding of fraud may not be sustained on this record, even if the lesser standard were somehow deemed applicable. For present purposes, however, it is sufficient to note that the trial court's failure to articulate and apply the higher "clear and convincing" burden should itself mandate reversal.

POINT II

THE LOWER COURT ERRED IN FAILING TO DISMISS THE AMENDED COMPLAINT AS A MATTER OF LAW

Magnaleasing's case must be judged against the uncontroverted factual backdrop against which it is set: defendants' representative -- a leasing agent who made verbal projections of future and speculative costs; plaintiff's representative -- an experienced real estate man, a lawyer for one of America's largest corporations, who claims to have relied on representations that could not have been relied upon; both parties -- sophisticated entities engaged in hard and careful and arms-length bargaining over the terms of a complicated commercial lease. Judge MacMahon's conclusion that actionable fraud could have been committed under these circumstances defies logic, common sense, and New York law.

To prevail in a suit charging actionable fraud, plaintiff under New York law must demonstrate, inter alia, that defendants made representations of past or presently existing fact, that the representations were untrue, that defendants knew the representations to be untrue and intended to deceive plaintiff thereby, and that plaintiff justifiably relied upon such representations in entering into the lease. See, e.g. Channel Master Corporation v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 176 N.Y.S.2d 259 (1958); Mendelow v. Slabodkin, 47 A.D.2d 712, 365 N.Y.S.2d 296 (4th Dept. 1975); Taylor v. Heisinger, 39 Misc.2d 955, 242 N.Y.S.2d 281 (Sup. Ct. Suffolk Co. 1963); 24 N.Y. Jur. Fraud and Deceit §14 et seq. With respect to the first such element and the last, plaintiff's case herein is defective as a matter of law. Application of the pertinent legal principles to the suit at bar demonstrates as much, and Judge MacMahon's failure to dismiss at the close of plaintiff's case was reversible error.

A. The representations principally sued upon were expressions of future expectations, inactionable as a matter of law.

Plaintiff's amended complaint and proof at trial, along with the trial court's decision, focussed principally on two predictions said to have been made by defendants: the first as to future Tax Rent that would be owing under the Lease, the second as to future Common Area Charges. As such, plaintiff's case was fatally flawed from the outset. It is simply too late in the day to challenge the body of New York law declaring a representation inactionable unless it is a "statement of existing fact, as opposed to [an] expression of future expectation" or a mere judgment or opinion. See, e.g., Channel Master Corporation v. Aluminum Limited Sales, Inc., 4 N.Y.2d at 407, 176 N.Y.S.2d at 262; David-

owitz v. Dixie Associates, 76 Misc.2d 554, 351 N.Y.S.2d 34, 39 (Sup. Ct. N.Y. Co. 1973), modified on other grounds, 44 A.D.2d 535, 353 N.Y.S.2d 447 (1st Dept. 1974).

Judge MacMahon's understanding to the contrary, discussed below, notwithstanding, the New York courts have repeatedly refused to predicate findings of fraud on predictions of the kind held actionable by the court below. Recent, unambigous case law reaffirms as much. Thus, in Irving Trust Company v. LaPilar Realty Inc., ___ A.D.2d ___, 391 N.Y.S.2d 131 (1st Dept. 1977), defendants had borrowed money from plaintiff bank to develop commercial property. Defendants resisted plaintiff's efforts to foreclose after default, claiming the bank had fraudulently induced them to enter into the transaction "with knowledge" that the project was dangerously underfinanced, viz., that the $1.5 million loan commitment extended would be inadequate. 391 N.Y.S.2d at 132. The Appellate Division reversed Special Term and directed that summary judgment be entered for the bank:

> [E]ven were the bank to have made representations as to the purported cost of the project, they could not be deemed fraudulent. Fraud, to be actionable, must be based on false representations of existing facts and not of mere opinion [citation omitted]. Id.

Similarly, in Lanzi v. Brooks, 54 A.D.2d 1057, 388 N.Y.S.2d 946 (3rd Dept. 1976), the Appellate Division reversed Special Term's denial of defendant's motion to dismiss plaintiff's fraud complaint. Defendant was said to have fraudulently represented that if plaintiff, an inventor, would forego seeking a patent and permit another to market his product, litigation would thereby be

avoided and plaintiff's royalty bonus would be that much greater. In dismissing as a matter of law, the Court stated:

> These allegations rely on a statement in which the defendant purportedly speculated about what he thought might happen in the future. Such a representation cannot support an action for fraud since it is not a statement of fact, but rather an expression of opinion [citation omitted]. 388 N.Y.S.2d at 949.

In Bailey v. Diamond International Corporation, 47 A.D.2d 363, 367 N.Y.S.2d 107 (3rd Dept. 1975), the character of the representation sued upon likewise rendered plaintiffs' claim inactionable. Plaintiffs alleged that defendants had fraudulently promised them a right-of-way over certain lands, which right-of-way defendants were to secure after litigation with third parties. Plaintiffs commenced suit after defendants lost their third-party litigation. The Appellate Division dismissed the fraud claim as legally insufficient:

> [D]efendants' assurances were predictions and statements of expectations only. They do not rise to the level of misrepresentation of an existing fact which is required to sustain a cause of action in fraud .... In this case the alleged representation did not relate to a known, certain and definite existing fact, but to the unpredictable result of litigation. 367 N.Y.S.2d at 110.

See also Puro v. Zimmerman, ___ Misc.2d ___, ___ N.Y.S.2d ___, "New York Law Journal," April 18, 1977, at 14 (Sup. Ct. N.Y. Co.), where the Court dismissed fraud claims predicated, as here, on sheer projections: "[D]efendants' estimates of depreciation were statements of expectation only, which did not rise to the level of misrepresentations of existing material facts, so necessary to sustain a fraud action. 'Mere promissory statements as to what will be done

in the future are not actionable.' (Adams v. Clark[,] 239 N.Y. 403.)"

Against this backdrop of oft-reiterated legal principles, Justice Arnold Fein's decision in Romance Bridals, Inc. v. 1385 Broadway Co., "New York Law Journal", January 27, 1976, at 6 (Sup. Ct. N.Y. Co.) may properly be understood as dispositive of the legal issue before this Court - and itself a basis for reversal of the judgment appealed from and dismissal of the underlying action. With respect to the principal issues litigated in Romance Bridals, they are identical to those presented in Magnaleasing. As here, suit was commenced by commercial tenants who claimed they had been fraudulently induced to enter into their leases. As here, these tenants alleged that the landlord's agent had underrepresented the future dollar cost of additional rent increases under tax and operating expenses escalation clauses in their proposed leases. As here, these representations were said to have been knowingly false when made and made with the intent of inducing plaintiff to rely thereon.

Justice Fein dismissed the complaint on motion, holding plaintiffs' claims defective as a matter of law:

> Plaintiffs have failed to establish the essential elements necessary to constitute causes of action for fraud. The alleged misrepresentations, if made at all, were not representations of fact but rather were expressions of an opinion or a future expectation. Romance Bridals, Inc. v. 1385 Broadway Co., supra.

Magnaleasing is not fairly distinguishable from Romance Bridals, and Judge MacMahon's decision below is simply not reconcilable with that of the Supreme

Court in Romance Bridals - nor, we submit, with the body of New York law upon which Romance Bridals stands. Could anything have more clearly constituted "statement[s] of future expression" than the two predictions - as to real estate taxes not yet levied, as to common area charges not yet incurred (A. 8a) upon which suit herein was principally predicated? Even Judge MacMahon acknowledged as much, during the trial:

> [I]t is a patent estimate. What taxes are going to be. I could not conceive of anything that's more an expression of opinion or an estimate than that. (A. 328)

In his decision, however, Judge MacMahon wholly ignored the sine qua non of actionable fraud in New York: that the representation sued upon must be one of material, existing fact. Rather, he cited (A. 41a) three cases for the undisputed proposition that under some circumstances, an expression of opinion may constitute fraud. Critically, none of these cases - nor any other located by defendants - held as actionable opinions as to what may happen in the future, i.e., predictions. One of the three cases, Hickey v. Morrell, 102 N.Y. 454, 7 N.E. 321 (1886), did not pass upon an opinion at all but rather a statement of unambiguous fact, viz., whether a given building was or was not fireproof. Another spoke to a representation that current assets were ample to pay off certain mortgages, an opinion in form but a statement of fact in substance. Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901). The third pertained to a representation that assessed the past success of a previous business venture, surely the very antithesis of a prediction of things to come. Taylor v. Burr Printing Co., 26 F.2d 331 (2d Cir.), cert. denied, 278 U.S. 641 (1928).

Perhaps the most telling way to demonstrate the trial court's fundamental error in this respect is to make clear what this case is not about. Plaintiff neither alleged nor proved that defendants gave their predictions as to future Tax Rent and Common Area Charges, knowing such predictions were low*. Indeed, plaintiff could not have so argued such a case, since, as shown below, the reliability of such forecasts was simply not "knowable". At best, plaintiff may be said to have proved only that defendants gave one set of predictions in the face of internally prepared predictions that prophesied higher Additional Rent charges. Judge MacMahon's decision turned on his conclusion that defendants "actually believed" these higher estimates (A. 45a; see also id. at 44a). With respect, such a conclusion was and is utterly irrelevant. Defendants' "belief" vel non in the currency of their predictions cannot change the reality that they were predictions - and hence incapable of sustaining an action for fraud under the law of the State of New York. Cf., Bailey v. Diamond International Corporation, supra; Romance Bridals, Inc. v. 1385 Broadway Co., supra.

B. Plaintiff could not have justifiably relied on the representations sued upon.

That reliance is necessary to state a claim for fraud is, of course, beyond doubt. Peerless Mills, Inc. v. American Telephone and Telegraph Company, 527 F.2d 445, 450 n. 2 (2d Cir. 1975) (applying New York law). More importantly

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* To the contrary, plaintiff's amended complaint charges simply that the predictions were fraudulent in that they proved wrong (A. 10a at ¶¶19-20).

and as stated above, it is a "fundamental precept" that the asserted reliance must be deemed justifiable before a fraud claim will be sustained. Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 603 (1959); Touche Ross & Co. v. Halperin, "New York Law Journal," Sept. 21, 1976, at 4 (Sup. Ct. N.Y. Co.). In the latter case, Justice Greenfield characterized plaintiff's fraud claim as "an egregious case of misplaced reliance." At best, instant plaintiff's claims can fare no better than those analyzed in Danann Realty and Touche Ross; under the circumstances, the claimed reliance cannot conceivably be considered justifiable.* In truth, the evidence proffered shows more; it shows that plaintiff could not have relied at all on the principal representations invoked, justifiably or otherwise.

1. Defendants' projections as to Tax Rent and Common Area Charges

Reliance may be deemed unjustifiable as a matter of law. In Cudemo v. Al and Lou Construction Co., Inc., 54 A.D.2d 995, 387 N.Y.S.2d 929 (3rd Dept. 1976), a fraud case predicated on a representation of existing fact, the Appellate Division reversed a jury verdict for plaintiff on precisely this ground. With respect to fraud claims bottomed, as here, on predictions, the cases finding no justifiable reliance are legion. Thus, in Charid Properties, Inc. v. Berger, 37 A.D.2d 986, 327 N.Y.S.2d 821 (2d Dept. 1971), aff'd, 32 N.Y.2d 667, 343 N.Y.S.2d 1320 (1973), the vendee under a contract to sell real property sought to rescind the agreement and damages, claiming fraud in the inducement. In particular, plaintiff alleged that defendants had falsely represented the

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* Whether Magnaleasing's asserted reliance was justifiable necessarily entails application of a legal standard. Accordingly, this Court may engage in an "unimpeded" review of Judge MacMahon's conclusion in this respect, i.e., free of the "clearly erroneous" rule. See infra at 41-2.

amount of rental income that would be generated during the first of two successive, optional 10-year renewal periods, the sale being subject to a net lease. In reversing Special Term's denial of defendants' motion for summary judgment, the Appellate Division held that plaintiff could not have justifiably relied on the alleged representations. 327 N.Y.S.2d at 822. In addition, the Court found that the representations, if made, were of opinion or law and, therefore, not actionable and that scienter could not be shown as a matter of law:

> Appellants' "admi[illegible] that the sellers purchased the property in 1967 with the under[illegible]ng that the annual rental during the first renewal period was lowe[illegible]n that allegedly represented to respondent does not prove scienter. At most, it tends to establish only that appellants misrepresented their own opinion as to the legal interpretations of the provisions of the amended lease. Id. (emphasis added).

Charid Properties invoked Zuyder Zee Land Corporation v. Broadmain Bldg. Co., Inc., 86 N.Y.S.2d 827, n.o.r. (Sup. Ct. N.Y. Co.) aff'd, 276 App. Div. 751, 92 N.Y.S.2d 607 (1st Dept. 1949), a case presenting a virtually identical fact pattern. There, Justice Botein had awarded judgment to defendant, dismissing plaintiff's fraud claim upon the ground that "[t]here could be no reliance by plaintiff as a matter of law ...." Id. at 829.

Analytically, the case at bar is indistinguishable from Charid Properties and Zuyder Zee. When all plaintiff's rhetoric is stripped away, defendants herein are essentially charged with having misrepresented their own opinion as to the interpretations of Section 4.5B and Section 5.3A(ii) of the Lease, viz.,

underestimating real estate taxes not yet levied, underestimating common area charges not yet incurred.

A similar result - on comparable grounds - was reached in Flam v. Campbell Bosworth Machinery Co., "New York Law Journal," October 12, 1973, at 17 (Civil Court of the City of New York, N.Y. Co.). There, tenant defended a non-payment summary proceeding and premised its counterclaims on the alleged fraudulent inducement by the landlord's agent. As here, the alleged misrepresentations went to the interpretation of a specific lease provision, the Flam tenant claiming that the landlord's agent had deliberately underrepresented the amount of additional rent due under a rent escalation formula. The Court found that the circumstances underlying the parties' transaction negated as a matter of law plaintiff's claim of fraud: It found the parties to have been sophisticated, knowledgeable businessmen experienced in the art of negotiating such leases; it found that tenant had submitted extensive, proposed modifications, some of which were ultimately incorporated into the lease; it found that the parties had conducted their negotiations at arm's length. In granting summary judgment for the landlord, the Court held:

> Given this statement of facts, it is deemed incredible that any support can be lent to the proposition that tenant intended to be bound by the oral representations of the landlord's representative and not by the terms of the written lease. At best, landlord's representations amounted to an opinion of the meaning of article 39; and tenant's subsequent actions in regard to the written lease confirm that it was not induced by that interpretation, nor did it rely upon it. In the absence of such reliance, and in the absence of proof that landlord misrepresented a material fact with the intent to deceive tenant and induce it to enter into this lease, a case in fraud or misrepresentation is not made out as a matter of law (Charid Pro-

perties, Inc. v. Walter Berger, 37 App. Div. 2d 987, aff'd 32 N.Y.2d 667; Zuyder Zee Land Corporation v. Broadmain Bldg. Co., Inc., 86 N.Y.S.2d 827, aff'd 276 App. Div. 751). Id. (emphasis added).*

And in Danzig & Danzig Associates v. Paolucci, "New York Law Journal," June 11, 1975, at 19 (Civil Court of the City of New York, Queens Co.), the Court rejected a tenant's claim of fraud bottomed on the landlord's alleged underestimation of the amount of electricity charges that would fall due under the provisions of a specific lease term. After holding that "the renting agent's 'oral representations' were merely opinions and estimates not to be relied upon ...," the Court noted that

> the lease clearly provided that the tenants "pay for all electricity ..." and did not provide any maximum limitation of their electrical costs. The evidence more than adequately indicates that the clause was brought to their personal attention. Id. (emphasis added).

Perhaps the case that best demonstrates the unjustifiable nature of Magna-leasing's asserted reliance is Irvlor Realty Corporation v. 62-114 Imlay Street Corp., 151 N.Y.S.2d 191, n.o.r. (Sup. Ct. Kings Co. 1956). There, the purchasers of a leasehold interest charged the sellers with fraud in the inducement. The contract of purchase and sale had been signed on March 3, 1955, negotiations having taken place in February and early March of that year. Specifically, plaintiffs alleged that defendants had represented

- that the assessed value of the property was $635,000, and

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* Citing Charid, the First Department affirmed Special Term's granting of summary judgment in favor of the defendant landlord, dismissing the tenant's fraud claims in the face of a rent escalation clause comparable to that held dispositive in Flam. New York Merchandise Co., Inc. v. 23rd Street Properties, Inc., 49 A.D.2d 849, 373 N.Y.S.2d 867 (1st Dept. 1975).

- that the tax rate for the coming fiscal year was to remain the same. Id. at 194.

Plaintiffs further alleged that at the time they made such representations, defendants "had knowledge" that the assessment had been increased by $295,000 (to $930,000) and that the tax rate was to increase by 16%. Id. Plaintiffs claimed that they would not have purchased the property had they known the falsity of these representations. Id.

The Court awarded judgment to defendants, essentially on the theory that plaintiffs could not have relied justifiably on the alleged representations. It noted that as of March 3, 1955, the date the contract was signed,

- the correct assessment, by law, had been a matter of public record since February 1, 1955, and

- the forthcoming tax rate, by law, was to be determined by the City Council in June, 1955, and was, therefore, "merely a matter of conjecture" at the time the contract was signed. Id. at 196.

The Court invoked Sylvester v. Bernstein, 283 App. Div. 333, 127 N.Y.S.2d 746, 748 (1st Dept.), aff'd, 307 N.Y. 778, 121 N.E.2d 616 (1954), for the proposition that reliance must be reasonable, found that the representations purportedly made respecting taxes were not "matters peculiarly within the [defendants'] knowledge" and held that plaintiffs "had the means available to them of knowing, by the exercise of ordinary intelligence, the truth or the real quality

of the subject of the alleged misrepresentations ...." Irvlor Realty Corp. v. 62-114 Imlay Street Corp., 151 N.Y.S.2d at 196. Accordingly, it entered judgment for defendants.

The applicability of Irvlor to the case at bar is apparent. If plaintiffs there could not have relied justifiably on representations as to then-current property assessments as well as future tax rates, still less can Magnaleasing be said to have relied reasonably on representations as to future real estate taxes, a product of property assessments yet to be made and tax rates yet to be promulgated.*

That real estate taxes yet to be levied on a shopping center yet to be built were indeed unknowable in 1972 seems beyond legitimate doubt. Similarly, it cannot fairly be denied that predictions as to Common Area Charges yet to be incurred at the unfinished Mall were no less speculative. Who could have predicted - and, more importantly, how can plaintiff seriously claim to have relied justifiably on forecasts that did not predict - the "double digit inflation, enormous increase in fuel and utility costs and doubling of the real estate tax rate on top of increased assessments" that have characterized New York City's commercial real estate market these last several years? See, City of Hope, Inc. v. Fisk Building Associates, "New York Law Journal," March 1, 1976, at 10-11 (Sup. Ct. N.Y. Co.). In City of Hope, the Court held that defendants, owner and manager of commercial property, would have to have been "soothsayers" to divine

* The time sequence of the pertinent events in the case at bar highlights the unjustifiable nature of plaintiff's claimed reliance on the representation as to future taxes. The representation was said to have been made on December 4, 1972. The massive assessment that led, ultimately, to the real estate taxes complained of could not have and did not become available until February 1, 1973, after which date it was a matter of public record. New York City Charter §1510. Plaintiff executed the Lease on April 26, 1973, i.e., two months before the 1973-1974 tax rate was promulgated, New York City Charter §1515, and at a time when that rate was a "matter of conjecture."

the increases in operating expenses and real estate taxes that prompted their commercial tenants to sue. Id. at 11. Indeed, even Judge MacMahon acknowledged the unpredictability of such expenses in this case. Defendant John Feist had been asked whether in 1972 Feist "kn[e]w" what real estate taxes would be on the fully assessed shopping center then under construction (A. 136). The trial court interjected: "[B]ut it is obvious, unless he can foretell the future." Id.

In this respect, it is critical to note that this is not a case where, as Judge MacMahon concluded (A. 42a), "one party ... [had] superior knowledge" of the subject of the representations. In truth, neither party was a "soothsayer"; neither party knew or could have known what the Additional Rent charges would be.* Indeed, "it was the parties' recognition of their inability to foresee

* Judge MacMahon concluded (A. 42a) that because only defendants could have known the estimated cost of constructing the Mall, only they were in a position "to form an opinion" respecting future real estate taxes and future common area charges. He further concluded (id.) that since the Mall was uncompleted at the time of the parties' negotiations, plaintiff "had to" rely and it was "reasonable" for plaintiff to rely on defendants' representations. Neither conclusion is supported by the record, and both conclusions are belied by a "real world" view from which this Court need not shrink. As to the first conclusion, too many certiorari proceedings - including four brought by defendants herein - over too many years bear eloquent witness to the proposition that real estate taxes are not levied as a mathematical function of building costs. Historically, property assessments have been handed down on bases that are notoriously subjective, unequal and unpredictable. See, e.g., Lynn (ed.) Property Taxation, Land Use & Public Policy at 58 (1976); N.E.L.R. "Equality in Property Taxation" at 617 (1976); Kramer, Assessment for Real Property Tax Purposes at ii (1975); Paul, The Politics of the Property Tax at 8 (1975). As to the second conclusion, it was not reasonable for Magnaleasing to have relied on defendants' predictions, and it is not true that plaintiff "had to" so rely. Magnaleasing was free to bring its independent judgment to bear on the problem - indeed, Magnaleasing was incorporated by Magnavox to render precisely such judgments (Joint Statement ¶25 at E 5) - and it declined to do so at its peril. More importantly, plaintiff did not "ha[ve] to" do the deal it did. It could have sought to protect itself by renegotiating the rent escalation clauses, renegotiating other portions of the Lease, or, if so inclined, abandoning the negotiations altogether. That plaintiff chose to sign the Lease it did cannot permit it to transform defendants' avowed predictions into the subject of justifiable reliance.

the future that required escalation clauses" in the first place. City of Hope, Inc. v. Fisk Building Associates, supra, "New York Law Journal," March 1, 1976, at 11. Put another way, "the clauses all attempt to accomplish a very basic and economically necessary purpose: the fixing of future rents by formulae which are on their face beyond either party's direct control to cover cost increases which are also beyond either party's control." Id. (emphasis added)

Again, it cannot be overemphasized that defendants' belief or disbelief in the worth of their predictions is legally irrelevant under New York law.* In Cudemo v. Al and Lou Construction Co., Inc., supra, a jury had awarded damages to plaintiff on the fraud claim, necessarily finding that defendants had intentionally misrepresented a material fact. 387 N.Y.S.2d at 929. Nonetheless, the Appellate Division reversed and directed entry of judgment for defendants, notwithstanding their avowed deception, since plaintiff "as a matter of law, could not have reasonably relied on defendants' representations ...." Id. at 930. Magnaleasing's asserted reliance is no more justifiable in this case and is itself a mandate for reversal.

Most of the foregoing discussion has centered on the nature of the predictions said to have been relied upon by Magnaleasing. When we look not only to the representations themselves but to "all the circumstances," Danann Realty Corp. v. Harris, 5 N.Y.2d at 322, 184 N.Y.S.2d at 603, under which the parties

* In his opinion (A. 41a), Judge MacMahon cited N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 729 (2d Cir. 1965), and Edgington v. Fitzmaurice, 29 Ch.D. 459, 483 (1885) for the proposition that a "statement of a man's opinion, estimate or prediction is a representation of his state of mind and, like his intent, is 'as much a fact as the state of his digestion.'" Ironically, Judge MacMahon overlooked this Court's commentary on the applicability of the classic English holding: "Lord Justice Bowen's witty simile would become a pernicious oversimplification if it were permitted to obscure the differences in the mode of ascertainment and the reliability of the conclusion." N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F.2d at 728.

negotiated, it can readily be seen that plaintiff could not have relied justifiably on the predictions here invoked. In particular, the sophistication evidenced by Magnaleasing throughout the negotiations and the hard bargaining that preceded and was reflected in the Lease conclusively negate plaintiff's claim to justifiable reliance on the leasing agent's projections of unknowable costs.*

The parties' Lease contains, as stated earlier, no ceilings in the rent escalation clauses (Sections 4.5B, 5.3A(ii)) at issue. The clauses specify that Magnaleasing is to pay its denominated share of additional rent charges, whatever such charges may be. As such, these provisions are utterly irreconcilable with the $1.00 and $.60 limitations (for Tax Rent and Common Area Charges, respectively) effectively said to have been represented by defendants' agent and claimed to have been relied upon by plaintiff.

Under all such circumstances, "'it can hardly be cogently argued that plaintiff relied upon alleged oral representations of the defendant[s], inconsistent with the language of the disputed escalation clause[s] ....'" New York Merchandise Co., Inc. v. 23rd Street Properties, 49 A.D.2d 849, 373 N.Y.S.2d 867, 868 (1st Dept. 1975). Magnaleasing can scarcely claim fairly to have relied at all and cannot legally claim to have relied justifiably on defendants' predictions as to future Additional Rent charges.

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* As noted above, Judge MacMahon refused (A. 202) to receive into evidence Magnaleasing's extensive Lease Comments (DX L at E 279). Not only do these Comments demonstrate generally that degree of sophistication inherently inconsistent with justifiable reliance on Magnaleasing's part; they demonstrate specifically Magnaleasing's essential non-reliance on defendants' predictions of Tax Rent and Common Area Charges. Nowhere in the Comments does Magnaleasing question the Lease's open-ended formulae (Sections 4.5B and 5.3A(ii)) for the calculation of Tax Rent and Common Area Charges; nowhere in the Comments does Magnaleasing endeavor to incorporate Kirtland's predictions into the Lease. The trial court's refusal to admit the Lease Comments into evidence was reversible error.

2. Defendants' statement as to occupancy

Respecting the representation as to 50% of the Mall having been leased and assuming that which defendants vigorously dispute* -- that the percentage in question relates solely to "leases signed" -- the uncontroverted evidence negates as a matter of law a finding of justifiable reliance on Magnaleasing's part.

Kelly testified (A.167) that on the occasion of the December 4, 1972 meeting, he and Kirtland worked with two leasing plans (plaintiff's exhibits 20 and 21),** one for each of the Mall's two levels. Each such plan bears a legend showing a large black dot in each space for which a signed lease had been obtained. Perusal of both plans show forty large black dots -- 10 on plaintiff's exhibit 20, 30 on plaintiff's exhibit 21 -- representing forty "lease[s] signed." Within each drawing of store space so indicated is marked the square footage of the space leased. Counting the spaces with the large black dots reveals that 104,225 square feet were shown to have been leased -- again, in the sense of "lease signed" -- on the two leasing plans. Put another way, the very leasing plans Kelly claims to have examined with Kirtland in December, 1972, showed that only 24.2% of the gross leasable area had been "leased." In the face of such specific and compelling documentary evidence, plaintiff cannot fairly claim to

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* See Point III, infra, at 52-5.

** In light of their bulk, plaintiff's exhibits 20 and 21 could not be included in the Joint Appendix. These exhibits are, of course, contained in the Record.

have relied -- justifiably or otherwise -- on "puffing" statements in advertising brochures mailed one month earlier.*

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* For the sake of clarity, defendants have broken out the "lease signed" data from the two leasing plans:

L-1 (Plaintiff's Exhibit 21) (lower level)		Square Footage Shown Leased
1.	Foxmoor	2,460
2.	Miles Shoes	2,160
3.	Scene II	5,067
4.	Lerner's	12,110
5.	Chess King	2,158
6.	Animals and Things	3,904
7.	Sid's Pants	825
8.	Chess Villa	1,050
9.	Hot Sam	260
10.	Wicks 'n' Sticks	910
11.	Orange Bowl	910
12.	Schonfeld Curtain	4,300
13.	Parnassus Boutique	1,710
14.	National Shirt	2,966
15.	Home Decor	3,832
16.	C.V.S.	3,937
17.	Nicols Stride-Rite + Florsheim	1,578
18.	Walden Books	6,138
19.	Furniture-in-the-Raw	1,080
20.	East River Savings Bank	8,128
21.	Fifth Avenue Cards	2,433
22.	National Shoes	2,820
23.	Karmelkorn	510
24.	Baskin Robbins	372
25.	Vanguard	768
26.	Kinney's Shoes	3,060
27.	Sgarlato's Deli	2,332
28.	Tom McAnn	3,795
29.	Cambridge Coffee, Tea and Spice	2,027
30.	Vincent's Jewelry	3,060
		86,670

The trial court rejected this argument because it found plaintiff's exhibits 20 and 21 to have designated 60% of the space as leased (A. 37a, 38a).

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* (Cont'd.)

L-2 (Plaintiff's Exhibit 20) (upper level)		Square Footage Shown Leased
31.	Naturalizer Shoes	1,860
32.	Hobby-Crafts	1,242
33.	Baskin Robbins	372
34.	Kaufman Toys	3,812
35.	Verranzano Restaurant	2,873
36.	Littman's Jewelers	1,860
37.	New York and Suburban Federal Savings & Loan	1,860
38.	The Tinder Box	630
39.	Bavarian Soft Pretzels	736
40.	Possibilities Staten Island	2,310
		17,555

Total square footage shown leased: 104,225 square feet
Total leasable area: 430,209.06 square feet
Percentage of leasable area shown leased: $\frac{104,225}{430,209.06} = 24.2\%$

In doing so, it misread the documentary evidence* and misunderstood the testimony of both Kellys. In particular, the District Court's statement - that both Kellys testified "that Kirtland told them that spaces fitted with the printed name of a merchant (but perhaps without a black dot) were also rented" (A. 40a) - is simply wrong.

Dale Kelly testified merely that on the floor plans "it was indicated the leases that had already been signed and also what was available... it was clearly marked on the black dots showing where leases had been signed" (A. 20 and 30), and that "on the same chart he had names of various stores that had signed other leases since at time [i.e., when the chart had been prepared]." (A. 30) Dale Kelly did not testify that Kirtland told him what the printed names on the plans signified.

John Kelly testified that "the leasing plan itself indicated the number of spaces which are leased, and those spaces where the leases are out... a large dot indicates the leases signed; a small dot indicates the lease was out." Kelly did not say that Kirtland told him this, only that to him, the leasing plan "indicated" this (A. 169; see also A. 248). Kelly, when questioned by the trial court, testified that Kirtland did not say how many leases were out for signature, nor did he ask Kirtland how many were out for signature (A. 169). Kelly also testified that Kirtland indicated to him "a number of other tenants

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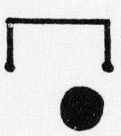
* To the extent that review of the evidence entails examination of documents, this Court may do so free of the usual "clearly erroneous" standard. See, e.g., Diversified Mortgage Investors v. U.S. Life Title Insurance Co., 544 F.2d 571, 577 (2d Cir. 1976); Munters Corporation v. Burgess Industries Incorporated, 535 F.2d 210, 211 n. 4 (2d Cir. 1976).

which he said had signed subsequent to the time the leasing plan was drawn up [October 18, 1972]" and that he wrote in on the upper left hand corner of plaintiff's exhibit 20 the names of these tenants (A. 170).* Furthermore, contrary to the District Court's finding ("Leased locations were designated by a black dot or the names of future tenants." (A. 37a), Kelly did not say that Kirtland told him what the printed names on the floor plans signified, only that "I thought it was my impression that they [the printed names] had been signed". (A. 248-49) To summarize, neither Kelly testified that Kirtland explained the printed (but "dot-less") names.

Kelly's amorphous "impression" that all printed names signified leases signed is belied by the very floor plans he claims to have relied upon. In the lower right hand corner of each exhibit (plaintiff's exhibits 20 and 21) appears the following legend in bold print:

"LEGENDS:



HVAC unit sharing**

- Lease signed"

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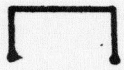
* These handwritten names (constituting only an additional 3.75% of the available space) are apparently the ones Dale Kelly was referring to when he said "on the same chart he had names of various stores that had signed other leases since that time." (A. 30) The printed names on plaintiff's exhibits 20 and 21 had to be on the chart at the time it was finalized -- October 18, 1972 -- and the names of those "that had signed other leases since that time" had to be the few handwritten ones that were added on December 4 by John Kelly.

** This refers to the heating, ventilation and air-conditioning system.

There is no reference in the legend to the printed names which appear on the plans or to "small black dots." In fact, a review of both plans shows there are no "small black dots" other than those few indicating "HVAC Unit Sharing" by the symbol  .

The District Court's conclusion that the leasing plans showed 60% of the space to have been leased* is, in sum, shown false by the exhibits themselves. The 60% sum was reached only by taking the 24.2% figure (large black dots= leases signed) and adding to it the area encompassed by the "dot-less" printed names (36.01% of the space) and that of the handwritten names (3.75%). Yet the printed names could not properly be included in such a calculation, in the face of the unambiguous legend on each plan - and, it cannot be overemphasized, neither Kelly testified that Kirtland told them to the contrary.** Accordingly, the District Court's conclusion that the plans showed 60% of the space leased is wholly unfounded and contradicted by the exhibits themselves and the testimony of both Kellys. The truth is the plans showed 24.2% of the Shopping Center leased, and Magnaleasing cannot properly claim to have relied justifiably on the 50% figure invoked in the amended complaint - especially not in light of the

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* "Over 60% of the available space was so designated". (A. 37a) "[T]he 60% shown on a floor plan....". (A. 38a)

** Put another way, there was only one way to read the leasing plans. Given some printed names with black dots (24.2%), more printed names without black dots (36.01%), a legend stating that a black dot means a signed lease, it is elementary that printed names without black dots could not have signified signed leases.

"clear and convincing" standard applicable to this and every other element of plaintiff's case.

In sum, Magnaleasing's claims were and are defective as a matter of law. As to the leasing agent's verbal representations, they were the sheerest of predictions, inactionable on their face. As to all three representations, Magnaleasing could not have justifiably relied thereon. The trial court erred in failing to dismiss at the close of plaintiff's case. This Court should reverse and dismiss.

POINT III

THE TRIAL COURT'S FINDING OF FRAUD ON DEFENDANTS' PART IS UNSUPPORTED BY AND, IN CRITICAL INSTANCES, IS NEGATED BY THE RECORD

A. The applicable legal standards for review

As to findings of fact by the trial court, Rule 52(a), Fed. R. Civ. P., provides that such findings are not to be set aside unless "clearly erroneous". Respecting Rule 52(a), it is black-letter law that a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence "is left with the definite and firm conviction that a mistake has been committed." United States v. U. S. Gypsum Co., 333 U.S.364, 394-95 (1948). Indeed, even a finding supported by "substantial evidence" may be set aside if found to be clearly erroneous. Case v. Morrisette, 475 F.2d 1300, 1307, n. 35 (D.C. Cir. 1973).

As to findings other than "of fact", the reviewing Court need only decide whether the trial judge was wrong, not whether he was "clearly" so. McLeod v. Business Machine and Office Appliance Mechanics Conference Board, 300 F.2d 237, 239 (2d Cir. 1962). In this respect, the trial court's application of even an admitted legal standard does not constitute a "fact" within the meaning of Rule 52(a) and is, therefore, subject to "unimpeded" review. Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-77 (2d Cir.), cert. denied, 385 U.S.

835 (1966). See also, In re Joseph Kanner Hat Co., Inc., 482 F.2d 937, 939 (2d Cir. 1973); In re Hygrade Envelope Corp., 366 F.2d 584, 588 (2d Cir. 1966).

In the case at bar, the trial court made three findings critical to its determination of the action:

- that defendants "deliberately misrepresented" their own estimates of future Tax Rent and Common Area Charges (A. 44a-45a);

- that defendants' representations concerning projections of Tax Rent and Common Area Charges were "material" (A. 48a), and

- that defendants' representation as to the level of leasing at the Shopping Center was false (A. 40a).

The first and third such findings are "clearly erroneous" within the meaning of Rule 52(a); the second is a misapplication of the applicable legal standard of materiality. All three findings are belied by the record herein.

In Friedman v. Golden Arrow Films, Inc., 442 F.2d 1099 (2d Cir. 1971) this Court reviewed the outcome of another non-jury trial and reversed a judgment predicated on fraud in the inducement, stating: "[A]ny finding or conclusion that [defendant] was guilty of fraud is unsupported by ... sufficient proof in this record and, hence, requires reversal." Id. at 1102. On the record presented by the case at bar, the Court should do no less.

B. The erroneous findings

1. that defendants "deliberately mispresented" their own estimates

Central to Judge MacMahon's decision in this case was his finding (A. 44a-45a) that defendants "deliberately misrepresented" their own estimates of future Tax Rent and Common Area Charges.* Simply put, the record is bereft of any support whatever for this finding.

As the trial court noted (A. 44a-45a), John Feist testified that he rejected the estimates proposed by Faughnan and Fraher and instructed his leasing agents to work with the estimates he himself had formulated. Judge MacMahon opined that as to the Tax Rent estimates, Mr. Feist's explanation was "totally incredible" and as to the estimates of Common Area Charges, "even less convincing". Yet, the trial court cited no evidence disproving Mr. Feist's account, for plaintiff had introduced none. Indeed, the trial court unambiguously predicated its finding on its disbelief of John Feist's explanation, effectively ignoring the black-letter principle that plaintiff's case may not rest solely on testimonial rejection or speculation of the finder of fact. Cf., Nieves v. Manhattan and Bronx Surface Transit Operating Authority, 31 A.D.2d 359, 297 N.Y.S.2d 743, 745 (1st Dept.), appeal dism., 24 N.Y.2d 1030, 302 N.Y.S.2d 852 (1969).

* As set forth in Point II, supra, such a finding is legally irrelevant given the nature of the representations (predictions) and the unjustifiable reliance (if that) thereon by Magnaleasing. Nonetheless, since the trial court addressed itself to this matter, defendants do likewise.

Magnaleasing concededly did introduce evidence that Mr. Feist was exposed to the estimates prepared by Faughnan and Fraher. Plaintiff concededly did introduce evidence that such estimates were significantly higher than Mr. Feist's own. Respecting the $1.00 projection for Tax Rent, plaintiff concededly did attempt to belittle Mr. Feist's testimony that he formulated his estimate in part by extrapolating from the experience of an adjacent Korvette's Shopping Center. On the critical question, however - whether Mr. Feist in fact believed the higher estimates of Faughnan and Fraher while nonetheless conveying lower estimates to his leasing agents - Magnaleasing introduced no proof at all. Even Judge MacMahon acknowledged as much during the closing arguments:

> THE COURT: I realize he [John Feist] was bombarded with estimates that were higher, but does that make his statement false? He said he relied on the Korvettes thing. He was thinking about Korvettes. There is no evidence that he wasn't. (A. 329) (emphasis added)

Indeed, to the extent the evidence introduced at trial bore even tangentially on the question at issue, it impels the conclusion that Mr. Feist had good reason to reject - and did in fact reject - the higher estimates prepared by Faughnan and Fraher. Thus, the projections proffered Mr. Feist were dramatically higher than expense data then existing for comparable shopping centers in the northeastern United States. Plaintiff introduced (PX 9 at E 67) a table from Dollars & Cents of Shopping Centers: 1972, a tri-annual publication of the Urban Land Institute. The table shows that notwithstanding Fraher's $1.19 to $2.00-plus estimates for Tax Rent and Faughnan's $1.76 to $2.26 estimates for Common Area Charges, comparable shopping centers were then averaging $.32

per square foot per year in real estate taxes and $.50 per square foot per year in operating expenses. Indeed, Faughnan himself conceded (PX 9 at E 62) the huge discrepancy between the proffered estimates and the then prevailing industry norms.

"[F]raud is not to be presumed from circumstances as consistent with innocence as with guilt". Burstein v. Cohen, 188 N.Y.S. 812, 813 (App. T. 1st Dept. 1921). John Feist's projections proved low. Magnaleasing demonstrated as much. Magnaleasing did not prove, because it could not, that Mr. Feist did not believe the estimates he himself formulated. To the extent the trial court found to the contrary, such finding was predicated on "a multitude of scattered inferences which were unreasonably drawn from flimsy evidence." Barr Rubber Products Company v. Sun Rubber Company, 425 F.2d 1114, 1121 (2d Cir. 1970). As such, that finding is "clearly erroneous."

2. that defendants' projections of Tax Rent and Common Area Charges were "material"

Whether or not defendants' projections of Tax Rent and Common Area Charges were "material" and hence capable of sustaining a fraud action necessarily entails application of a legal standard. As such and as noted above, this Court is not bound by the "clearly erroneous" rule; it may engage in an "unimpeded" review of the trial court's conclusion that such projections were material. Upon review, it should determine that such projections could not have been material.

For one thing, to conclude that Magnaleasing could not have relied justifiably on such projections - see Point II, supra, at 24-33 - is to conclude that such projections could not have been material. Cf., Dopp v. Franklin National Bank, 461 F.2d 873, 880 (2d Cir. 1972).

For another thing, a critical examination of the record - focussing especially on the discrepancy between the projections as alleged in the amended complaint and as testified to by plaintiff's own witnesses - shows that defendants' projections cannot legally be deemed material.

a. Tax Rent

Plaintiff's original complaint had alleged simply that defendants had represented that "Tax Rent would be one dollar ($1.00) per square foot per annum". (¶11) Shortly before trial, Magnaleasing apparently realized that such a representation could not possibly be judged material absent accompanying representations as to 1) the period of time during which such projection was said to be effective, and 2) the increment by which plaintiff's Tax Rent would increase over the years. Accordingly, Magnaleasing served and filed an amended complaint, alleging (A. 8a, ¶10(c)) defendants to have represented that Tax Rent would be "approximately" $1.00 per square foot per year "when the Mall was fully operational and thereafter subject to normal tax increases." Yet at trial, plaintiff failed wholly to prove the representation embraced by the terms of its amended complaint; not only did plaintiff prove no more than the original complaint's inactionable formulation - that defendants had represented that Tax

Rent would be $1.00 per square foot per year - it offered evidence negating the pertinent allegations of the amended complaint.

As to the duration of the $1.00 Tax Rent estimate, the District Court made no such finding. It made no such finding because plaintiff offered no such proof.

As to the supposed increment said to have been encompassed by the Tax Rent estimate, the trial court found as follows: that at the December 4 meeting and after stating the $1.25 Tax Rent estimate ("with the landlord paying the first $.25"), Kirtland "said that ... thereafter taxes would be subject to normal increases" (A. 41a). Such finding, taken almost verbatim from the amended complaint, is undermined in toto by the testimony of Kelly, plaintiff's principal witness and the man who negotiated the Lease. Kelly admitted (A. 241) that neither Kirtland nor the Lease stated or represented that the $1.00 estimate would "thereafter be subject to normal tax increases."*

In short, there was an utter failure of proof on plaintiff's part respecting allegations necessary to sustain the transformation affected by the pleadings: the shift from an immaterial representation to a material one.**

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* Kelly also testified (A. 240) that Kirtland never used the word "approximately" respecting the Tax Rent estimate.

** Curiously, the District Court refrained from finding specifically that defendants' $1.00 projection for Tax Rent was material. Instead, it found (A. 44a) that the "tax charged" a tenant is a "material fact". With this innocuous but irrelevant proposition, defendants do not quarrel.

To the extent this Court would continue to inquire into the materiality vel non of defendants' Tax Rent estimate notwithstanding plaintiff's failure of proof, such inquiry must be resolved against Magnaleasing in light of the circumstances under which the negotiations were conducted. Thus and as shown above, Magnaleasing's Kelly was no novice with respect to leasing space in shopping centers; he had brought several years of leasing experience with him to the negotiating table opposite Kirtland (A. 227, 252), as well as his training as a lawyer (Joint Statement ¶21 at E 4)). Regarding Tax Rent and following the December 4 meeting, Kelly noted privately "All over 25¢/SF" (PX 22 at E 236) by which he understood that "their [defendants'] obligation was limited to 25 cents and anything in addition we would pay". (A. 190-91) Kelly did not ask Kirtland why his letter of January 15, 1973 (PX 23 at E 239) outlining the defendants' offers failed to mention the $1.00 estimate of Tax Rent (A. 195).* Kelly did not make such inquiry of Kirtland even though he understood the letter to mean that plaintiff would pay its proportionate share of everything over and above the first $.25 paid by the landlord (A.194). In addition, Kelly conceded that he expected a Lease provision to provide for Magnaleasing's obligation to pay Tax Rent (A. 195), that he expected to pay in accordance with such a provision (id.), that he held such expectations at the time he signed the Lease (id.), and that he did not complain to Kirtland about the Lease's failure to make mention of the $1.00 Tax Rent estimate (A. 231). Furthermore, Kelly himself viewed the negotiation of the Lease as an arms-length transaction (Joint Statement ¶55 at E 14).

* Respecting taxes, the January 15, 1973 letter said simply: "Real Estate Taxes: Landlord will pay first $.25 per square foot. Tenant will pay his proportionate share all over." (E 240)

To the extent the District Court may be said to have concluded that defendants' projection concerning Tax Rent was material, such conclusion is, in sum, belied by the record herein.

b. Common Area Charges

The same defects that refute the claimed materiality as to defendants' Tax Rent projection equally permeate - and vitiate - comparable claims as to defendants' projection of Common Area Charges. Plaintiff's original complaint had charged simply (¶12) that defendants represented that "Common Area Charges would be sixty cents ($.60) per square foot per annum." Magnaleasing's amended complaint modified this allegation in critical respects, averring (A. 8a, ¶10(d)) that defendants had represented that such Charges would be "approximately" $.60 per square foot per year "for the initial year of operation and thereafter subject to normal increases due to inflation."

The District Court found (A. 41a) Kirtland to have said at the December 4 meeting that Common Area Charges would be $.60 "for the initial year and thereafter would be subject to normal increases due to inflation." Again, the record not only fails to support this central finding; it conclusively refutes it.

Thus, contrary to the allegations in paragraph 10(d) of the amended complaint, Kelly conceded (A. 241-42) that neither Kirtland nor the Lease stated or represented that the $.60 figure was to be applicable "for the initial year of operations." Similarly, Kelly acknowledged that neither Kirtland nor the Lease

stated or represented that the $.60 figure would "thereafter [be] subject to normal increases due to inflation." (Id.)* Kelly conceded (A. 192) that the language of plaintiff's exhibit 23 ("CAM: Tenant will pay his proportionate share. Will be billed $.60 per square foot." (E 239)) provided simply that the Common Area Charges would be billed at $.60 per square foot and further conceded (A. 193) that Kirtland had made no representation as to how long such estimate would be in effect; likewise, Kelly acknowledged (id.) that he had no understanding in this respect. Finally, Kelly testified that he expected a Lease provision to provide for Common Area Charges (A. 193-94), that he expected to pay in accordance with such a provision (A. 194), and that he held all such expectations at the time he signed the Lease (A. 195). Once again, plaintiff's failure of proof in critical respects and candid testimony - never referred to by the District Court - respecting the Lease negotiations negates any possible conclusion that defendants' projection of Common Area Charges was material. Again, absent such materiality, Magnaleasing's claim is inactionable.**

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* Kelly also testified that Kirtland never used the word "approximately" respecting the Common Area Charges estimate (A. 241-42).

** Respecting both Tax Rent and Common Area Charges, the trial court excluded evidence (A. 283-86) that would have demonstrated how much more additional Rent Magnaleasing, a "leased space" tenant, paid than its "leasable space" counterparts. See supra, at 13-14. The relevance of such evidence is readily apparent; had Magnaleasing negotiated "leasable" additional rent formulae, the discrepancy between defendants' projections and Magnaleasing's actual Tax Rent and Common Area Charges would have been that much narrower - and Magnaleasing's claims that the representations were "materially" misleading that much weaker.

Kelly's testimony also refutes the District Court's conclusion that defendants' representation as to the estimate of Common Area Charges was false. Kelly acknowledged (A. 226-27) that Kirtland's representation was fully reflected in the "$.60 clause" in the Lease. Yet that representation was indisputably true. The analysis is straightforward.

Respecting both Tax Rent and Common Area Charges, the Lease provides for Mall to render interim statements estimating such prospective charges and for Magnaleasing to pay in accordance with such estimates (PX 15 at E 118-20 and 125-27, Sections 4.5A and B and 5.3B). Following the close of the relevant periods -- New York City's fiscal year respecting Tax Rent, the Lease Year respecting Common Area Charges -- such interim payments are to be reconciled with the actual costs, Magnaleasing to be credited with overage, if any, and to be billed for Additional Rent charges still owing, if any. For Tax Rent, Mall rendered the first such statement on or about the date the Shopping Center opened, August 9, 1973 (Joint Statement ¶64 at E 16). For Common Area Charges, the Lease itself contained the first such interim estimate:

> For purposes of the period from the Commencement Date (August 9, 1973] to the date Landlord furnishes the first statement to Tenant [April 15, 1974], Landlord's estimate of Tenant's Proportionate Share of Common Area Charges shall be 60¢ per annum per square foot of Floor Space in the Demised Premises. (E at 126-27) (emphasis added)

This clause - and, therefore, Kirtland's representation - was honored to the letter by defendants. In the eight months between the Commencement Date, August 9, 1973, and the date Mall furnished the first Common Area Charges

statement, April 15, 1974, "[l]andlord's estimate" of Common Area Charges was $.60 (A. 367) and Magnaleasing did pay in accordance with that estimate (Id.).

3. that defendants' statement as to the leasing level at the Shopping Center was "false"

With respect to plaintiff's allegations concerning defendants' statement that the Shopping Center was 50% leased at the time Magnaleasing was negotiating its Lease, the District Court found that defendants had made a material, false representation (A. 40a). This finding is clearly erroneous in light of the record herein, for the evidence shows that in a very real sense, the representation was true.

Initially, the District Court found that "John and Dale Kelly testified that Kirtland said the Mall was practically all leased" (A. 37a) and that "Kirtland told the representatives of Magnavox, on December 4, that the Mall was almost all rented". (A. 38a) These findings were based upon a demonstrably erroneous reading of the testimony of both Kellys. Kelly, responding to a question on cross-examination as to whether he had earlier testified that "Mr. Kirtland said that the entire mall was leased except for two spaces", stated:

"A. That is not what he said.

Q. What did he say?

A. He said the entire mall in our size range -- we were talking about three or four thousand square feet or thereabouts -- in our size range, there were only two available spaces in the whole mall. Everything else was leased." (A. 249; see also A. 167) (emphasis added)

Kirtland's statement that only two spaces in the size range needed by plaintiff were available is hardly a representation that the entire Mall was "practically all leased."

Dale Kelly was referring to this statement by Kirtland when he testified that Kirtland said that the Mall "was about 90% leased" (A. 19), for when Dale Kelly so testified he was relating the substance of the December 4 meeting. Indeed, in the next sentence he referred to Kirtland's statement that "there were only one or two spaces left of our requirements". (A. 19-20) (emphasis added) Kelly, who was participating in the December 4 meeting with Dale Kelly, contradicted Dale Kelly when he said in response to a question by the Court ("Did he state [at the December 4 meeting] in any terms or substance what percentage of the mall was leased?"): "Not that I can recall." (A. 169) Kelly later testified (A. 238) that Kirtland "did not use the 50 per cent figure" recited in paragraph 10(b) of the amended complaint.

As to the representation that "at the time plaintiff was negotiating its lease the Mall was already more than 50% leased," (A. 8a, ¶10(b)), such statement -- if deemed a representation -- was true. Plaintiff claims that defendants made the representation in two advertising circulars, dated August and November, 1972 (PX 2 and 3 at E 46 and 48). By way of example, the November brochure states in pertinent part:

> "Feist & Feist, developers of the mall with associated investors, said that leasing has surpassed the 50 per cent mark." (E 48)

The District Court found that this representation was false (A. 38a), but by any meaningful standard, leasing had "surpassed the 50 per cent mark."

Plaintiff's exhibit 6 is a Feist document dated September 14, 1972. In terms of percentage of leasable area, exhibit 6 shows that at that time 19.01% was denominated "Total Leases Signed" and 44.68% was labelled "Leases Out to Tenants." John Feist's testimony stands unrefuted that respecting "Leases Out to Tenants" in this time period -- August, 1972 to August, 1973 -- approximately 95% were ultimately consummated (A. 141). Similarly unrefuted is his testimony that leases "out" referred to leases "that ha[d] been agreed to by both parties and... sent out for signature" (A. 141), that such space was "considered leased" (A. 143), and that his leasing representatives had been instructed not to lease such space to anyone else (Id.). Contrary to the District Court's statement, defendants did not contend that the "consummation of these agreements was a mere formality". (A. 39a) What defendants do (and did) contend is that the 44.68% "Leases Out to Tenants" was empirically and properly considered "leased" by them and that when that percentage is taken together with the 19.01% on which leases had been executed as of September 14, 1972, the 50% figure contained in defendants' advertising brochures was true.

Moreover, it would be sophistic in the extreme to exclude from such reckoning the store space occupied by Sears, Roebuck & Co. and R.H. Macy & Co., Inc. Not only did John Feist testify (A. 140) that Sears and Macy's are integral components of the Staten Island Mall; both subject brochures (PX 2 and 3) proclaim as much on page 1, and Kelly admitted (A. 235) that Sears and Macy's are indeed "major"

Mall tenants. Since the area occupied by Sears and Macy's - approximately 415,000 square feet (A. 140) - is by itself nearly as great as the covered mall portion of the center -- 430,209.06 square feet (Joint Statement ¶14 at E 3) -- the District Court's finding that the 50% statement was false is difficult to fathom.

In sum, the trial court erred in making three central findings: Plaintiff did not prove that John Feist did not believe the Additional Rent estimates he had himself formulated. Plaintiff did not prove the making of the Additional Rent representations alleged in the amended complaint, and absent such proof, the representations that were testified to could not have been material. Plaintiff did not prove that defendants' statement as to the leasing level at the Shopping Center was false. The trial court erred in finding and concluding to the contrary.

POINT IV

IN LIGHT OF PLAINTIFF'S INACTION LONG AFTER LEARNING OF THE WRONGS COMPLAINED OF, THE TRIAL COURT ERRED IN GRANTING RESCISSION

It has long been black-letter law that a lease fraudulently procured by a landlord is merely voidable, not void, and that a tenant who, after learning of the wrong, remains in possession and enjoys the use of the premises has ratified the lease and is estopped to attempt to avoid its obligations thereunder. Barr v. New York, Lake Erie and Western Railroad Co., 125 N.Y. 263, 26 N.E. 145 (1890); 3 Rasch Landlord & Tenant §1380, at 209 (1976 ed.). In particular and by not moving promptly, such a tenant forfeits any right he would otherwise have had to rescind the lease. Fink v. Friedman, 78 Misc.2d 429, 358 N.Y.S.2d 250, 259 (Sup. Ct. Nassau Co. 1974); Brendese v. City of Schenectady, 194 Misc. 150, 85 N.Y.S.2d 856, 861 (Sup. Ct. Schenectady Co. 1947), aff'd, 273 App. Div. 831, 75 N.Y.S.2d 884 (3rd Dept.) aff'd, 297 N.Y. 965, 80 N.E.2d 355 (1948); Restatement, Contracts §§484, 510. Such principles are in accord with the law respecting rescission of contracts generally. See Gannett Co., Inc. v. Register Publishing Company, 428 F.Supp. 818, 824-25 (D. Conn. 1977) (applying New York law) and cases cited therein.

The foregoing principles are compellingly applicable to the case at bar. Magnaleasing learned on or about August 9, 1973, that its initial Tax Rent had been fixed at $2.45 per square foot per year, i.e., more than the $1.00 estimate Kirtland is said to have made. Yet not for sixteen (16) months, until December

19, 1974, did it give notice of intention to rescind the Lease. Similarly, it waited eight months from April 15, 1974, the date it learned that its Common Area Charges would be $2.58, not the $.60 said to have been predicted. And, of course, plaintiff had been aware of the occupancy level at the Shopping Center since November, 1973, at which time its sub-tenant opened for business (Joint Statement ¶17 at E 4).

During the many months of inaction, a severe slump overtook the economy and the real estate market fell off to practically zero. The trial court took judicial notice of such (A. 389). In short, defendants' ability to secure a new tenant on a 15-year lease under comparable terms was demonstrably impaired. Under such circumstances, it would be inequitable to permit Magnaleasing to rescind.

The trial court's finding (A. 46a) that Magnaleasing objected after learning of each discrepancy and engaged in brief settlement negotiations with defendants cannot excuse plaintiff from the consequences of its failure to give prompt notice of its intention to rescind. To object and talk settlement is not necessarily to "relieve the would-be rescinder of his duty to take the steps the law requires to preserve his rescission remedy." Gannett Co., Inc. v. Register Publishing Company, 428 F.Supp. at 835. "Time no more stands still during settlement negotiations culminating with a rescission demand than it does when the statute of limitations runs during settlement." (Id.) Under long understood principles, Magnaleasing's sixteen-month delay in demanding rescission irrevocably barred it from obtaining equitable relief. The trial court erred in rescinding the Lease.

POINT V

THE TRIAL COURT ERRED IN SUA SPONTE REOPENING THE CASE AND DIRECTING THE DAMAGES REFERENCE

The trial of this action took place on March 22, 23, and 24, 1976. At no time did plaintiff seek or obtain leave to bifurcate the trial, viz., to try the liability issue first, to leave the damages issue for another day. In his July 6, 1976, decision, Judge MacMahon granted plaintiff rescission of its Lease with defendants. Presumably, in view of the paucity of proof on the damages issue (see e.g., A. 365, 378 and 379), the Court felt constrained to direct the reference that yielded, ultimately, the damages award at issue herein.

A. Reopening the case on the damages issue three months after plaintiff had rested was improper

The re-opening of a case after it has been closed has been termed a "pernicious practice," and where a party has not shown diligence in introducing proof, such reopening may be denied. Reconstruction Finance Corp. v. Commercial Union of America Corp., 123 F.Supp. 748, 750 (S.D.N.Y. 1954). "The time for testing of proof is the time of trial." Locklin v. Switzer Brothers, Inc., 299 F.2d 160, 169 (9th Cir. 1961), cert den., 369 U.S. 861, reh. denied, 369 U.S. 891 (1962). In light of Magnaleasing's stance below (D-11) that there was sufficient evidence in the trial record on which to base a damages award, "it is not given to a judge to engage in a prospecting quest for other evidence" by reopening, on his

own motion, a case to receive further evidence. Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966).

If a party seeks reopening to introduce new evidence at the time the trial court is to render its decision, such reopening may only be appropriate if the stringent standards for granting a new trial are met — the new evidence was unknown at the time of trial, and/or was excusably neglected. Fed.R.Civ.P. 59; 6A Moore's Federal Practice ¶59.04[13] (1974 ed.). Neither condition was present herein.

On March 23, 1976, after two full days of putting on its case, plaintiff rested (A. 275). Later that day, the defense rested (A. 289). Thereupon, Magnaleasing declined the court's offer of the opportunity of rebuttal. (Id.) On this record, it was clearly improper for the trial court to conduct plaintiff's case: for the court to order - sua sponte, by decision rendered three months after closing arguments - the reopening of the case and the introduction of further evidence on damages. For if, as plaintiff insisted to the Magistrate below, sufficient evidence of damages had already been introduced, reopening was an improper "prospecting quest" by the court. Arthur Murray, Inc. v. Oliver, supra. If, however, there was insufficient evidence of damages at trial, plaintiff's neglect in introducing such evidence has never been explained and is clearly inexcusable. See Reconstruction Finance Corp. v. Commercial Union of America, supra. In either event, reopening was unwarranted.

Plaintiff had argued (D-10) before Magistrate Jacobs that defendants had waived their right to object to the reference. While, as shown below, this argument is unavailing with respect to the propriety of directing a reference under Rule 53, Fed.R.Civ.P., it cannot in any event defeat defendants' objection to the trial court's sua sponte reopening the record long after plaintiff had rested. See, e.g., Arthur Murray, Inc. v. Oliver, supra, one of many cases that clearly distinguishes between a court's authority and discretion to reopen a case and to order a reference.

B. The reference was improper

Rule 53(b), Fed.R.Civ.P., states that a reference is proper only in very limited situations:

> A reference to a master shall be the exception and not the rule.... [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

While Judge MacMahon's decision recited (A. 48a) that "the issue of the amount of damages... is complex and will involve matters of accounting," the instant case did not in fact involve determination of those issues for which a reference is classically appropriate. See Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975), text at notes 102-103, and cases cited. With no disrespect intended toward the Magistrate, there were neither sophisticated accounting matters to wrestle with nor complicated computations

to effect. In sum and in light of Rule 53(b), the reference was improper.

Notwithstanding Judge MacMahon's conclusion (A. 144a), defendants did not waive their right to object to the reference. In the first moments of the first hearing before Magistrate Jacobs, counsel for defendants objected to the reference (D-4-10) on the grounds that it was unauthorized. Objecting before the special referee in the first instance has been recognized as a proper method of preserving the objection to the reference. See, Diamond Doors Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199, 1206 (9th Cir. 1974). In Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975), cert. den., 424 U.S. 917 (1976), the Court explained why waiver would be found where objection was first raised on appeal:

> A party objecting to a reference should do so prior to or at the time of the reference.... Such procedure permits the proper and efficient administration of the judicial process. Otherwise, a party disappointed with a master's report would be able to obtain 'a second bite at the apple' by withholding his objection to the reference until after the report. (emphasis added)

As shown above, defendants herein objected "at the time of the reference." Accordingly, the rationale that underlies a finding of waiver is patently inapplicable herein. Cruz v. Hauck, supra. It is not defendants, but plaintiff who has received "a second bite at the apple." It was plaintiff who was given, by judicial grace, an additional opportunity to present evidence of damages. The reference was as unauthorized as the trial court's threshold decision to reopen the case itself.

CONCLUSION

The judgment awarding Magnaleasing damages of $156,769.99 against defendants and rescinding Magnaleasing's lease with defendants should be reversed and plaintiff's claims should be dismissed in all respects.

Dated: New York, New York
July 8, 1977

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

X COURT OF APPEALS
SECOND CIRCUIT

MAGNALEASING, INC.,
Plaintiff-Appellee,

- against -

STATEN ISLAND MALL, BLACKFRIARS REALTY CORPL. & TOTTENHAM REALTY CORP.,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 8th *day of* July *19* 77 *at* 200 Park Avenue New York, N.Y.

deponent served the annexed Brief *upon* Keane & Butler, Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 8th *day of* July *19* 77

Kevin E. Thomas
Print name beneath signature
KEVIN E. THOMAS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979